

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

76-6182

To be argued by
DANIEL RIESEL

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76 6182

Cal. No. 889

STEFANOS ZAOUTIS,

Plaintiff-Appellee,

v.

MAURICE KILEY, as District Director for the New York
District of the Immigration and Naturalization Service,
and IMMIGRATION AND NATURALIZATION SERVICE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

WINER, NEUBURGER & SIVE
*Attorneys for Plaintiff-
Appellee*

425 Park Avenue
New York, New York 10022

DANIEL RIESEL,
Of Counsel

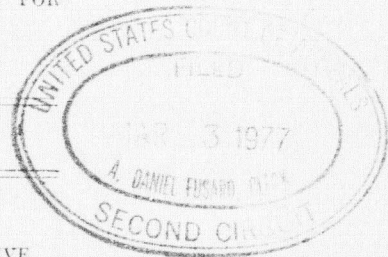


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UNITED STATES COURT OF APPEALS
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STEFANOS ZAOUTIS,

Plaintiff-Appellee,

-against-

MAURICE KILEY, as District Director of the
New York District of the Immigration and
Naturalization Service, and IMMIGRATION AND
NATURALIZATION SERVICE,

Defendants-Appellants.

APPELLEE'S BRIEF

STATEMENT OF THE ISSUES

I.

Does Section 246(a) of the Immigration and
Nationality Act render a rescission action
untimely when it could not appear to the
satisfaction of the Attorney General that
the alien was not, in fact, eligible for an
adjustment of status until eight years after
that adjustment?

II.

Should this Court defer to an administrative agency when its decision is not based on legislative intent, was inconsistent with prior decisions, and involves a question of law?

III.

Do the regulations implementing Section 246(a) of the Immigration and Nationality Act bar and preclude an order of rescission entered after five years?

IV.

Is Zaoutis precluded from asserting the protection of Section 246(a) of the Immigration and Nationality Act because the government delayed the presentation of evidence?

STATEMENT OF THE CASE

This is an appeal from a decision of Judge Inzer B. Wyatt of the Southern District of New York granting plaintiff summary judgment and denying defendants' motion for

summary judgment (A-237-243).^{1/} Judgment was entered on September 14, 1976 (A-244). Defendants filed their Notice of Appeal sixty days thereafter (A-246).

The complaint was filed by an alien who sought review of the defendants' action in rescinding his status as an alien lawfully admitted to permanent residence within the meaning of Section 101(a)(20) of the Immigration and Nationality Act (hereafter: the "Act"), 8 U.S.C. § 1101(a)(20). That complaint was filed on June 10, 1975, and service was completed on June 17, 1975 (A-1). However, the defendants failed to answer until July 26, 1976, over a year later (A-131). In the intervening period, plaintiff moved to enter defendants' default and for summary judgment pursuant to Rule 56, Fed.R.Civ.P. (A-18). In that motion plaintiff contended that defendants' action was barred pursuant to Section 246(a) of the Act, 8 U.S.C. § 1256(a), because the rescission action had taken place after the five-year period provided for in Section 246(a) of the Act. Defendants "cross-moved" for summary judgment on July 26, 1976, and contended that the rescission action was not barred because plaintiff was notified by letter of intended action prior to the extension of the five-year period (A-137).

^{1/} References preceded by the letter "A" are to the joint appendix filed with this Court on February 4, 1977 by Appellants but erroneously styled "Appendix of Defendants-Appellants."

Judge Wyatt, after hearing oral argument, rendered his decision, granting plaintiff's motion for summary judgment on August 11, 1976 (A-237).^{2/}

STATEMENT OF THE FACTS

(a) The Parties.

The plaintiff, Stefanos Zaoutis, is a native and citizen of Greece, who lawfully entered the United States on November 6, 1963 as a non-immigrant employee of the Government of Greece (A-20).^{3/}

Zaoutis was born in 1940 on the small Aegean Island of Ikaria. He spent the first twenty years of his life on Ikaria in a small farming village called Brakades. The standard of living in Brakades has long been depressed as the farms are no longer capable of supporting the families that own them. In 1960, Zaoutis was conscripted into the

^{2/} Appellants incorrectly state that "a hearing was held before the Honorable Inzer B. Wyatt." (Appellants' brief at 2). No hearing was requested or held as all parties conceded that there were no material facts in dispute and that their respective motions for summary judgment could be entertained by the Court.

^{3/} Aside from his initial basis for permanent residence, Mr. Zaoutis would be entitled to an immigrant's visa to the United States by virtue of his brother's citizenship, and pursuant to Section 203(a)(5) of the Act, 8 U.S.C. § 1153 (a)(5). He would have eventually been able to obtain the benefits of that section of the Act's provisions but for the unlawful rescission which has practically barred the submission of that petition for an immigrant's visa by plaintiff's brother.

Greek Navy. Upon his discharge, his family was able to obtain a job for him as a Clerk in the Greek Consulate in New York City. His duties included serving as a doorman and giving directions to people entering the consulate (ibid.). Zaoutis has maintained a residence within the United States since that initial entry. He has been supported and assisted by his citizen brothers and sister. Mr. Zaoutis is employed in the restaurant business and has been regularly working as many as sixteen hours per day, seven days per week (ibid.).

The defendant, Maurice F. Kiley, is the District Director of the New York District of the Immigration and Naturalization Service (hereafter: the "Service"). The Service is a branch in the Department of Justice charged with administering the laws of the United States pertaining to the entry of immigrants and removal of aliens. Kiley's predecessor initiated rescission proceedings against the plaintiff, Zaoutis (A-21). These proceedings which plaintiff contends violated his statutory rights, are the subject of this action.

(b) Adjustment Of Status On August 25, 1965.

Prior to January 1965, Zaoutis worked for the Government of Greece in the City of New York and was in no danger of being deported. However, on or about January 10, 1965 Zaoutis entered into a marriage in the City of New York with a woman named Fredeswinda Camacho. Thereafter, Mrs. Zaoutis

(nee Camacho) filed a petition to accord the plaintiff nonquota status as a spouse of a United States Citizen pursuant to Section 201(b) of the Act, 8 U.S.C. § 1511(b). The defendant Service approved that petition on or about May 10, 1965 (A-22). Thereafter, the next step in changing an alien's status from one of a temporary status to that of a permanent resident was granted on August 25, 1965, pursuant to Section 245 of the Act, 8 U.S.C. § 1255. This process is usually referred to by the Service as "adjustment of status" and the date that Zaoutis' status was adjusted will be hereafter referred to as the "adjustment date."

On August 5, 1967, Zaoutis obtained a divorce from Camacho in a Mexican divorce proceeding (A-141). In October 1967, he returned to his native Ikaria where he married a childhood acquaintance (A-30). Zaoutis promptly filed a petition to accord his new wife immigrant status. The Service has refused to process that application (A-30) and his wife and subsequently born children have remained in Greece. Zaoutis, however, has stubbornly clung to his residence in America (A-20). Here, assisted by his citizen brothers and sister he works to support his wife and children and returns to Ikaria on short infrequent visits.

(c) Untimely Attempt At Rescission.

According to the Service, Zaoutis' marriage to Camacho came under investigation prior to the end of 1967 (A-141). On or about May 13, 1969, an immigration investigator indicated

that there were "strong indications that the marriage was contracted as a sham and a fraud" (A-156). Apparently, Service investigators took their time in completing their investigation, for it was not until February 24, 1970 that they obtained a statement from Camacho wherein she withdrew her prior statement to the effect that her marriage to Zaoutis was not a sham (A-157).

As indicated, on or about May 20, 1970, Kiley's predecessor, P.A. Esperdy, acting as the District Director of the New York District of the defendant Service mailed the plaintiff a letter stating "that the Immigration and Naturalization Service intends to rescind the adjustment of status heretofore granted in your case" (A-31). The aforesaid letter (hereafter the letter or notice of intent) stated in pertinent part:

"It is herein alleged that:

5. On January 10, 1965 you went through a marriage in New York, New York with Fredeswinda Camacho.

6. You entered into such marriage ceremony with Fredeswinda Camacho solely for the purpose of obtaining nonquota status under the immigration laws.

7. You did not intend to enter into a bona-fide marital relationship with Fredeswinda Camacho.

8. You have never resided with Fredeswinda Camacho as husband and wife and you have never had sexual relations with Fredeswinda Camacho."
(A-31)

The letter of intent further informed the plaintiff that he might:

"submit, within thirty (30) days from the date of service of this notice, an answer in writing under oath setting forth reasons why such rescission should not be made."
(A-32)

The letter of intent also stated:

"You may also within that time request a hearing before a special Inquiry Officer in support of, or in lieu of, a written answer." (A-32)

Zaoutis promptly retained an attorney who by June 10, 1970 filed a Notice of Appearance and stated in writing that Zaoutis "requests a hearing before a special inquiry officer concerning the allegations made in your letter of May 20, 1970." (A-24,33). Zaoutis' then counsel indicated his willingness to attend a prompt hearing:

"For information purposes I will be leaving the United States on June 29, 1970 and not returning until July 27, 1970. Accordingly, should a hearing be scheduled, it should either be before or after these dates so that the alien may be represented at such time." (A-33).

Despite this demand for a hearing, the defendant failed to convene a hearing before a special inquiry officer until more than a year had elapsed after the letter of intent had been mailed. Significantly this was more than six years subsequent to the date of adjustment (A-24). The delay was caused by a deliberate Service decision to postpone the hearing. The United States Attorney explained this delay to

the District Court: "the rescission proceedings were held in abeyance in part because of a request by a Bar Association disciplinary committee investigation" (A-144).^{4/}

On June 2, 1971, the proceedings were convened before a special inquiry officer (A-24,34).^{5/} Zaoutis' counsel promptly moved to terminate the proceedings because the five year period had expired and the period was not tolled by the mailing of a letter of intent (A-36). In support of his

^{4/} The United States Attorney also annexed to his affidavit a memorandum dated September 9, 1970, and placed in Zaoutis' immigration file.

"As arranged, the subject [Zaoutis] appeared (with his attorney, Nicholas Altomerianos) before ARTHUR WINOKER, Assistant Counsel, Co-ordinating Committee on Discipline, 37 West 43rd St., New York, N.Y., today, in connection with their investigation into the alleged professional misconduct of Attorney PETER K. TIMON (A6 622 757).

Mr. WINOKER advised the undersigned that in his opinion, the subject was cooperative to his satisfaction and that he may be used as a witness against TIMON. It was Mr. WINOKER's guess that the case against TIMON might be completed by the end of December 1970. He requested this Service, if feasible, to hold in abeyance the pending rescission proceedings against the subject until the completion of the TIMON matter before its body...." (A-169) (emphasis added).

^{5/} Special inquiry officers currently are also known as Immigration judges (8 C.F.R. § 1.1(1)). Special inquiry officers have been delegated the Attorney General's authority to hear and adjudicate rescission proceedings. 8 C.F.R. §§ 246.4, 246.6.

argument, counsel cited Quintanna v. Holland, 255 F.2d 161 (3rd Cir. 1958), and the then recent District Court decision in the Northern District of California, Singh v. Immigration and Naturalization Service, 313 F. Supp. 532 (N.D. Calif. 1970). 'Zaoutis' counsel urged and the special inquiry officer agreed that there should be a ruling on Zaoutis' Motion to Terminate prior to the taking of evidence. The special inquiry officer asked for briefs and Zaoutis' counsel requested ten days to submit briefs on the issue of termination (A-41,42). The special inquiry officer ended this hearing by noting that he would "advise the proper authorities to schedule the hearing for futher hearing" (A-42) in the event that he made a determination adverse to Zaoutis.

However, "the proper authorities" did not convene the next hearing until April 10, 1972, almost seven years after the date of adjustment (A-44). At the commencement of the hearing the special inquiry officer addressed Zaoutis' counsel and ruled "at the last hearing on June 2, 1971, you made a motion to dismiss on the ground that the five year limitation had expired. At that time I reserved my decision on the motion in light of the fact that there had been appeal [sic] pending in United States Court of Appeals for the ninth district in the matter of Singh v. the Immigration Service, et al. I now deny your motion on the basis of this decision which has been handed down by the court in that case." (A-46).

The special inquiry officer was correct with respect to his chronology for a Board of Immigration Appeals' decision construing the five year limitation had been reversed by the Northern District of California in Singh v. Immigration and Naturalization Service, 313 F. Supp. 532 (N.D. Cal. 1970), on May 27, 1970, seven days after the letter of intent was mailed. Thereafter, the Service had appealed and on February 24, 1970, the Immigration Service prevailed in the Ninth Circuit. Singh v. Immigration and Naturalization Service, 456 F.2d 1092 (9th Cir. 1970), cert. denied 409 U.S. 847 (1972). Thus, the special inquiry officer, after receiving Briefs within ten days, had waited until the Ninth Circuit had decided the Singh case. This interval consumed a period from June 2, 1971 to February 1972. For some unexplained reason the special inquiry officer and the Service did not convene the hearing until several months later in April, 1972.

(d) Receipt Of Evidence Seven Years After Adjustment Date.

Accordingly, the Attorney General's delegate, the special inquiry officer, did not receive one iota of evidence until the five year period had been exceeded by almost two years. The initial evidence received consisted of Mr. Zaoutis' stipulation that the allegations of seven out of the ten allegations of the letter of intent were true.

However, Zaoutis contested the fact that the marriage was purely a fraud upon the Service (A-47). The Service then promptly called Zaoutis as its first witness. Zaoutis took the stand and for the first time denied the allegation that he entered into marriage solely for the purpose of committing a fraud upon the Service. Thus, Zaoutis was sworn and indicated that although the passage of time had created considerable problems with his ability to recall details, he had entered into a legitimate marriage with Fredeswinda Camacho and he testified that he had actually resided with her. At the close of Zaoutis' examination by the Service's trial attorney, Zaoutis' counsel waived cross-examination (A-62) and the Service's trial attorney asked for an adjournment of the proceedings until June 22, 1972 on the ground that he had a "witness coming in from quite a good deal of distance away" (A-62).

The Service contends that Zaoutis improperly delayed the hearings, and as evidence of that delay, they point to a letter attached to the United States Attorney's affidavit submitted to the District Court (A-171). Zaoutis' attorney did request an adjournment of the hearing scheduled for June 22, 1972. In his letter of June 9, 1972, he stated:

"I respectfully request an adjournment of this matter until some time in September in view of the following reason. The alien Stefanos Zaoutis, as your file indicates, has remarried, and his wife is in Greece. She just

recently gave birth to their third child. He is presently with her, since she is very sick, due to the childbirth. She has asked that he not leave her at this particular time, and I respectfully request on humanitarian grounds that this case be put over until some time in September, 1972." (A-171)

Apparently, the Service acquiesced to this request but adjourned the hearing to October 2, 1972 at which time the government called Fredeswinda Camacho and Angel Collazo. Camacho testified that her marriage to the plaintiff was not consummated and that she had entered into such marriage purely for monetary considerations. Collazo's testimony corroborated Camacho. The Service then scheduled the next hearing for February 7, 1973 at which time Zaoutis' counsel's attempt to make further application to the special inquiry officer was abruptly terminated and the hearing closed. The special inquiry officer stated, "In due course I will make my decision and serve upon respondent's counsel and the Trial Attorney a copy. This hearing is closed." (A-78)

The special inquiry officer, however, did not render his decision until another eight months had elapsed (A-79). On October 15, 1973, eight years after the plaintiff's status had been adjusted, the special inquiry officer who had conducted these proceedings rendered his decision and order rescinding plaintiff's immigration status pursuant to Title 8 C.F.R. § 246.6. In pertinent part the special inquiry officer reaffirmed his prior decision:

"The Service submitted that the provision of Section 246(a) of the Act was tolled when the respondent was served with a notice of intention ... on May 20, 1970 within the five year period, although the hearing attendant upon said notice had not commenced or had not been completed within the five year period. Decision on this motion was reserved pending decision by the United States Court of Appeals, Ninth Circuit in the case of Jiwan Singh vs. Immigration and Naturalization Service et al which involved the interpretation of the statute of limitation provisions in Section 246 of the Act. The decision in the aforementioned matter ... unequivocally sustains the Service position that service of a notice to rescind the adjustment within five years of the adjustment of status tolls the statute of limitations." (A-79,80)

The special inquiry officer, in addition to reaffirming his prior decision on the five year statute, found the testimony of Fredeswinda Camacho and the other government witness was totally credible and the testimony of Zaoutis appeared to be not credible.

(e) Administrative Appeal.

On October 23, 1973, Zaoutis filed a timely appeal with the Board of Immigration Appeals, an agency of the Department of Justice empowered to hear appeals in rescission hearings pursuant to 8 C.F.R. § 246.7 (A-175).

Oral argument before the Board was heard on January 21, 1974, and on May 2, 1974 the Board entered a terse order dismissing the appeal (A-86). The decision of the Board of Immigration Appeals stated in pertinent part:

"At oral argument before us, counsel for the respondent did not challenge the sufficiency of the evidence to satisfy the Service's burden of proof, but relied solely on the statute of limitations argument, asking that we recede from our holding in Matter of Singh, 13 I&N Dec. 439 (BIA 1969), sustained in Singh v. INS, 456 F.2d 1092 (9 Cir. 1972), cert. denied 409 U.S. 847. We see no reason to do so, and adhere to it. We also reject counsel's argument that the proceedings should be terminated because the Service waited so long (almost a year) after he had requested a hearing before according respondent one. We fail to see how respondent was prejudiced by the delay. Insofar as the evidence is concerned, we are satisfied from our independent review of the record that the immigration judge's fact findings are supported by evidence which is clear, convincing and unequivocal." (A-87)

Accordingly, the Service concluded its administrative proceedings against Zaoutis almost nine years after his date of adjustment.

(f) Litigation In The District Court.

Zaoutis commenced this action in the Southern District of New York on June 10, 1975 (A-1).

The complaint alleged nine claims for relief (A-3). The first claim alleged that the rescission was void because it

had not occurred within five years of the date of adjustment. The second and third claims alleged that the defendant District Director lacked valid authority and grounds to "toll" the statute. The fourth, fifth and sixth claims for relief alleged that the Attorney General had delegated his authority under Section 246(a) of the Act to special inquiry officers and that rescission was barred because no evidence was presented to the special inquiry officer within five years, and alternatively that he did not render a decision within the five year period. The seventh claim for relief, again setting forth an alternative theory, alleged that rescission was void because the Board of Immigration Appeals did not render a decision within the five year period. The eighth and ninth claims dealt with the government's failure to prosecute and failure to carry its burden of proof.

The defendants time to answer or move with respect to the complaint expired on August 10, 1975 (A-2). Thereafter, attempts to obtain responsive pleadings from the government met with failure (A-22, 27). On June 21, 1976, Zaoutis moved for summary judgment pursuant to Rule 56, Fed.R.Civ.P. and for the entry of the defendants' default. These motions prompted a governmental response and on or about July 20, 1976 the defendants filed their answer, and on July 26, 1976, the defendants cross-moved for summary judgment.

In the motion for summary judgment, Zaoutis argued that the mailing of the notice of intent did not toll the five year period, and that at a minimum a special inquiry officer must conduct a hearing for anything "to appear to the satisfaction of the Attorney General..." within the five year period. Zaoutis did not abandon any claims but limited his argument for the purpose of summary judgment. The Service argued that the time requirements of Section 246(a) were satisfied by the District Director's mailing of the notice of intent to rescind within the five year period.

The District Court noted that the District Director had mailed his notice on May 20, 1970, and that such procedure stemmed from the Code of Federal Regulations, specifically 8 C.F.R. § 246.1. The Court then observed:

"In this notice there is no statement that it had appeared 'to the satisfaction of the Attorney General' [or a designated representative, such as the District Director] that Zaoutis 'was not in fact eligible for . . . adjustment of status'. On the contrary, the notice states that it is 'alleged' and that it is 'charged' that Zaoutis was not in fact eligible for adjustment of status. The Regulations (8 CFR 246.1), however, provide that 'if it appears to a district director that a person residing in his district was not in fact eligible for the adjustment of status made in his case, a proceeding shall be commenced by the service upon such person of a notice of intention to rescind ...', etc." (A-239) (brackets and deletions in original).

Judge Wyatt rejected the Service's argument that the mere sending of the notice satisfied the statutory requirements:

"The quoted Regulation partly tracks the language of the statute (8 U.S.C. § 1256 (a)) as to it appearing that the alien 'was not in fact eligible ...', etc. and substitutes 'district director' for 'the Attorney General' as used in the statute. It seems clear, however, that the determination and notice by the district director which commences the proceedings is not a delegated determination under the statute which requires rescission of the adjustment of status. The object of the proceeding under the Regulations is to determine whether the alien 'was not in fact eligible for such adjustment of status' (8 U.S.C. § 1256(a)), a determination made for the Attorney General by the Board of Immigration Appeals after an initial decision of a special inquiry officer. 8 CFR 3.1, 246.6, 246.7." (A-239,240)

The District Court found that the administrative proceedings were completed on May 2, 1974 when the Board of Immigration Appeals rejected Zaoutis' appeal and held:

"It seems perfectly clear to me that it was on May 2, 1974, that it appeared 'to the satisfaction of the Attorney General' that Zaoutis 'was not in fact eligible for...adjustment of status'. Since this date was long after the five year limitation in 8 U.S.C. § 1256(a), the rescission of the adjustment of status of Zaoutis is barred by that limitation." (A-241)

Judge Wyatt then summarized the principal contention of the parties and examined the authorities cited in support of the contending positions:

"Singh v. I. & S. in the Ninth Circuit, above cited, fully supports the defendants but, after careful consideration and with great deference to the able Ninth Circuit panel, I cannot accept the result. The Ninth Circuit simply found the practical consequences of the statute to be 'absurd' (456 F.2d at 1097). Such consequences, if true, do not justify rewriting the statute. As it stands, the statute has a plain bar to rescission. If this be an example of a bad policy, the solution is to ask Congress to change the statute.

The Third Circuit in Quintana v. Holland, 255 F.2d 161 (3rd Cir. 1958), reaches a conclusion contrary to that of the Ninth. The reasoning of Judge Goodrich is more persuasive to me than that of the Ninth Circuit." (A-242).

Judgment was entered on September 14, 1976 (A-244,245), and the defendants filed their notice of appeal sixty days thereafter.

RELEVANT STATUTE

Section 246 of the Immigration and Nationality Act [Act of June 27, 1952 as amended, 66 Stat. 163], 8 U.S.C. § 1256:

(a) If, at any time within five years after the status of a person has been adjusted under the provisions of section 244 of this Act or under section 19(c) of the Immigration Act of February 5, 1917, to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of

status, the Attorney General shall submit to the Congress a complete and detailed statement of the facts and pertinent provisions of law in the case. Such reports shall be submitted on the first and fifteenth day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution withdrawing suspension of deportation, the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made. If, at any time within five years after the status of a person has been otherwise adjusted under the provisions of section 245 or 249 of this Act or any other provision of law to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person and cancelling deportation in the case of such person if that occurred and the person shall thereupon be subject to all provisions of this Act to the same extent as if the adjustment of status had not been made.

RELEVANT REGULATION

§246.1 Notice.

If it appears to a district director that a person residing in his district was not in fact eligible for the adjustment of status made in his case, a proceeding shall be commenced by the personal service upon such person of a notice of intention to rescind which shall inform

him of the allegations upon which it is intended to rescind the adjustment of his status. In such a proceeding the person shall be known as the respondent. The notice shall also inform the respondent that he may submit, within thirty days from the date of service of the notice, an answer in writing under oath setting forth reasons why such rescission shall not be made, and that he may, within such period, request a hearing before a special inquiry officer in support of, or in lieu of his written answer. The respondent shall further be informed that he may have the assistance of or be represented by counsel or representative of his choice qualified under Part 292 of this chapter, without expense to the Government, in the preparation of his answer or in connection with his hearing and that he may present such evidence in his behalf as may be relevant to the rescission.

* * *

§246.4 Special inquiry officer's authority; withdrawal and substitution.

In any proceeding conducted under this part, the special inquiry officer shall have authority to interrogate, examine, and cross-examine the respondent and other witnesses, to present and receive evidence to determine whether adjustment of status shall be rescinded, to make decisions thereon, including an appropriate order, and to take any other action consistent with applicable provisions of law and regulations as may be appropriate to the disposition of the case. Nothing contained in this part shall be construed to diminish the authority conferred on special inquiry officers by the Act. The special inquiry officer assigned to conduct a hearing shall, at any time, withdraw if he deems himself disqualified. If a hearing has begun but no evidence has been adduced other than the notice and answer, if any, pursuant to §§ 246.1

and 246.2, or if a special inquiry officer becomes unavailable to complete his duties within a reasonable time, or if at any time the respondent consents to a substitution, another special inquiry officer may be assigned to complete the case....

* * *

§246.6 Decision and order.

The decision of the special inquiry officer may be oral or written. Except when a determination of rescission is based on the respondent's admissions pursuant to § 246.5(c), the decision shall include a discussion of the evidence and findings as to rescission. The formal enumeration of findings is not required. The order shall direct either that the proceeding be terminated or that the adjustment of status be rescinded. If status was adjusted through suspension of deportation, the rescission order shall further provide that the matter be referred to Congress pursuant to section 246 of the Immigration and Nationality Act. Service of the decision and finality of the order of the special inquiry officer shall be in accordance with, and as stated in §§ 242.19 (a) and (b) and 242.20 of this chapter.

* * *

§246.7 Appeals.

Pursuant to Part 3 of this chapter, an appeal shall lie from a decision of a special inquiry officer under this part to the Board of Immigration Appeals. An appeal shall be taken within 10 days after the mailing of a written decision or the stating of an oral decision....

ARGUMENT

POINT I

THE RESCISSION WAS UNTIMELY AND BARRED BY STATUTE BECAUSE IT DID NOT APPEAR TO THE SATISFACTION OF THE ATTORNEY GENERAL THAT ZAOUTIS WAS INELIGIBLE WITHIN FIVE YEARS OF HIS ADJUSTMENT.

(a) Untimely Rescission Means Banishment.

America has been Stephen Zaoutis' home since 1963. However, since 1970 he has lived with the threat of banishment. That threat exists because the Service's administrative action rescinded his status as a permanent resident. The action of the Service is illegal as it flies in the face of the clear congressional policy to allow aliens to remain in the United States after a certain passage of time despite irregularity in their obtaining the status of a permanent resident. That policy is set forth in Section 246(a) of the Act, 8 U.S.C. § 1256. The Section specifically provides:

"If, at any time within five years after the status of a person has been otherwise adjusted ... to that of an alien lawfully admitted for permanent residence, it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind the action taken granting an adjustment of status to such person"

The District Director of the New York District mailed Zaoutis a Notice of Intention to rescind his status on May 20, 1970. At that time, Zaoutis had been living in the United States for seven years. That letter was mailed within the critical five year period which terminated on August 25, 1970. Zaoutis contested the allegations set forth in the letter and demanded a hearing before a special inquiry officer pursuant to 8 C.F.R. §§ 246 et seq.

Despite Zaoutis' demand for a reasonably prompt hearing, a hearing was not convened until June 2, 1971, six years after the adjustment date, and as Zaoutis' contends, at a time barred by Section 246(a) of the Act. However, even at that late date, the government was not prepared to proceed and the special inquiry officer, after hearing motions, adjourned the hearing until May 10, 1972, almost two years after the letter of intent was mailed, and seven years after the adjustment date and in Zaoutis' ninth year of residence in the United States. Zaoutis argued before the Service, as he now contends, that the mere sending of a letter of intent shortly before the expiration of the five year period, does not satisfy the unique requirements of Section 246(a) of the Act. However, the special inquiry officer denied Zaoutis' motion to terminate the rescission proceedings on these grounds and in so doing, described the government's position as being "that the service of the notice to rescind the

adjustment within five years of the adjustment of status tolls the statute of limitations." A timely appeal was filed by Zaoutis, and eventually the Board of Immigration Appeals sustained the government's position.

If the Service's construction of the statute is correct, Zaoutis' hope for continuing to live in the United States is severely jeopardized.

(b) Statutory Construction Favors Zaoutis.

The unsuccessful alien in a rescission proceeding is stripped of his right to remain in the United States and faces deportation to a land which may have now become alien to him. Accordingly, the draconian consequences associated with a successful rescission proceeding mandate the method of construing Section 246(a) of the Act. Thus, this Court has only recently stated:

"Deportation and denial of citizenship have, since ancient times, been among the most dreaded governmental sanctions." Corniel-Rodriguez v. Immigration and Naturalization Service, 532 F.2d 301, 305 (2d Cir. 1976).

It is the rationale that mandates the construction of the Act. Accordingly, "[i]t is settled doctrine that deportation statutes must be construed in favor of the alien." Lennon v. Immigration and Naturalization Service, 527 F.2d

187, 193 (2d Cir. 1975). ^{6/}

The rationale favoring the alien in the construction of the Act was summed up by Mr. Justice Douglas:

"We resolve the doubts [in favor of the alien] because deportation is a drastic measure and at times the equivalent of banishment It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." (Citation omitted) Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

Thus, paraphrasing the Court in Fong Haw Tan, the government's position that "service of a notice to rescind the adjustment of status within five years of the adjustment of status tolls the statute of limitations" trenches on Zaoutis' freedom far beyond that which is required by the narrowest of several possible meanings of the words used by the Congress in enacting Section 246(a).

On this appeal, the government argues that this rule of construction is not applicable to Section 246(a) because it is a rescission and not a "deportation" statute. This argument cavalierly ignores reality, the Service's prior position,

^{6/} This Court has also formulated the rule to be that because deportation is a "drastic penalty", statutes providing therefore must be strictly construed. Bonsztein v. Immigration & Naturalization Service, 526 F.2d 1290 (2d Cir. 1975).

decisions of other Circuits and this Court's recent decision in Marino v. Immigration and Naturalization Service, 537 F.2d 686 (2d Cir. 1976).

The Service and the Courts have long recognized that rescission usually results in deportation. Thus, the Court in Quintanna observed: "[t]hat which is accomplished by a rescission of status is pretty harsh ... and results in banishment" Quintanna v. Holland, 255 F.2d at 164. The Service has argued that Courts of Appeal have original jurisdiction to review rescission orders because such orders are "integrally related" to deportation. Waziri v. United States Immigration and Naturalization Service, 392 F.2d 55, 56 (9th Cir. 1968). The Service and the Courts have acknowledged that the results of rescission loom as harsh as the formal execution of deportation by imposing the same high standards of proof used in deportation hearings in rescission hearings. Yaldo v. Immigration and Naturalization Service, 424 F.2d 501 (6th Cir. 1970); Waziri v. United States Immigration and Naturalization Service, supra; Rodrigues v. Immigration and Naturalization Service, 389 F.2d 129 (3rd Cir. 1968).

This Court only recently dealt with the construction of a "deportation statute" and construed it in favor of the alien. Marino v. Immigration and Naturalization Service, supra. There this Court dealt with a statutory construction

problem in the context of eligibility for adjustment of status pursuant to Section 245 of the Act, 8 U.S.C. § 1255. The Court declined to make the distinction urged here by the Service and held:

"This principle of construction is fully applicable in this case although we are focused specifically on the question of eligibility for adjustment of status rather than deportability." Marino, 537 F.2d at 691, n.5.

Perhaps the short answer to the government's argument on statutory construction is that rescission of lawful status results in a virtual automatic finding of deportability under Section 241(a)(9) of the Act, 8 U.S.C. § 1251(a)(9).^{7/} Indeed, the alien subject to deportation because of rescission is often less able to obtain the Attorney General's discretionary relief from deportation than a deportable alien that has not been subject to rescission.^{8/}

^{7/} "Section 241 (a) Any alien in the United States ... shall, upon the order of the Attorney General, be deported who

(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to Section 248, or to comply with the conditions of any such status...."

^{8/} For example, a permanent resident alien may have utilized his status to travel abroad and thus significantly interrupted his actual residence in the United States to such an extent that he will be unable to obtain the benefits of Section 244 of the Act, 8 U.S.C. § 1254 which allows the Attorney General to suspend deportation if the alien "has been physically present in the United States for a continuous period of not less than seven years"

Accordingly, Section 246(a) must be construed in a broad and liberal manner to favor the alien and doubts as to the meaning of the words of the statute must be resolved in favor of the alien. The special inquiry officer and the Board of Immigration Appeals never considered this canon of construction, and rejected this principle that has been enunciated by the Supreme Court and reiterated on recent occasions by this Court.

(c) Mailing The Notice Of Intent Is Insufficient.

The government has not only failed to consider the applicable principles relating to construction of the rescission statute but it has simply read into the Act certain terms and phrases that were not placed there by Congress. Thus, a restatement of the government's position is that the mere mailing of a notice of intention to rescind within five years satisfies the statutory requirement that if "within five years ... it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible for such adjustment of status, the Attorney General shall rescind" In so doing, the Service has actually made two assumptions. Those assumptions are that Section 246(a) of the Act is a conventional statute of limitations and that the mailing of a letter to an alien is sufficient to toll that statute of limitations.

Zaoutis contended that the sending of a letter is not relevant and that the statute requires the Attorney General's delegate to be satisfied within five years that the alien was not, in fact, eligible. The District Court agreed with this position and held that the special inquiry officer must be satisfied with the five year period (A-239, 240).

Indeed, this point is specifically conceded by the Appellants on this appeal. Thus, the Service represents that: "Under the current regulations the Commissioner [of the Service] has delegated his authority regarding the conduct of adjustment of status rescission proceedings to Special Inquiry Officers" ^{9/} The delegation from the Attorney General through the Commissioner is to be "satisfied" that adjustment of status was not warranted. We submit that the statutory requirements mean that the Attorney General's delegate must, at the very least, conduct a hearing ^{10/} within the prescribed period. Quintanna v. Holland, supra.

^{9/} Appellants' brief at 22, n.32.

^{10/} The Appellee refers to the "trial-type" hearing described by Professor Davis:

"A 'hearing' is any oral proceeding before a tribunal. Hearings are of two principal kinds - trials and arguments. But the two may be combined with any proportion of each.

A 'trial' is a process by which parties present evidence, subject to

Footnote continued on succeeding page.

(d) Administrative Reliance On Recent Judicial Authority.

Zaoutis' arguments before the special inquiry officer and the Board of Immigration Appeals were based, to a large extent, on the Third Circuit's decision in Quintanna v. Holland, supra. However, unfortunately for Zaoutis another case was decided in 1972 by the Ninth Circuit, Singh v. Immigration and Naturalization Service, supra. The special inquiry officer in rejecting Zaoutis' argument merely stated that the Ninth Circuit's decision "unequivocally sustains the Service's position." The Board of Immigration Appeals also relied on Singh. Accordingly, we think a starting place in this discussion is a comparison of the Singh and Quintanna decisions.

The Court in Quintanna construed the language of Section 246(a) and held that the sending of a notice of intent was

Footnote continued from preceding page.

cross-examination and rebuttal, and the tribunal makes a determination on the record. The key to a trial is opportunity of each party to know and to meet the evidence and the argument on the other side; this is what is meant by a determination 'on the record.' The opportunity to meet the opposing evidence and argument includes opportunity to present evidence, to present written or oral argument or both, and to cross-examine opposing witnesses." (footnote omitted).

K. Davis, Administrative Law (3rd ed. 1975) at 157.

not a sufficient administrative action to meet the five year requirement of the statute.

The Court reasoned:

"What is the described action the Attorney General must take? In our opinion the giving of notice within the five-year period is not enough. The statute uses the words 'it shall appear to the satisfaction of the Attorney General' and so forth. We think that something appearing to an officer's 'satisfaction' means that he must have something more than a hunch about it, or even more than that he may be convinced in his own mind. We think it means a reasonable determination made in good faith after such investigation and hearing as is required." (footnotes omitted)
Quintanna 255 F.2d at 164.

In reaching its conclusion that a hearing was required the Court noted that the word "satisfy" meant in the context of Section 246(a) "[t]o free from doubt, suspense, or uncertainty, to give assurance to; to set at rest the mind of; to convince...." Quintanna at 164 n.8.

Accordingly, the mailing of a letter is irrelevant because as the Court concluded in Quintanna, nothing can "appear to the satisfaction of the Attorney General" until after some formal hearing and adjudication has taken place. We know from the examination of the administrative record that nothing could have appeared to the satisfaction of the Attorney General's delegate, the special inquiry officer, until the five year period had elapsed. This is so, because not only was there no trial-type hearing, but Zaoutis had

never made a statement to the District Director within the period specified under Section 246(a) of the Act.

The Second Circuit has also reached the same results as the Third Circuit. In Pierno v. Immigration and Naturalization Service, 397 F.2d 949 (2d Cir. 1968) Judge Smith observed:

"Section 246(a) empowered the Attorney General to revoke the status adjustment of any person within five years of that person's status adjustment, if it appears to the Attorney General that the person was ineligible for adjustment." Pierno at 951.

Although, the Court did not discuss its rationale, it is clear that the Court concluded that the revocation had to occur within the five year period. This conclusion may even be a more demanding position than the position taken by the Third Circuit.

Of course, the Service is much happier with the Ninth Circuit decision in Singh v. Immigration and Naturalization Service, supra, as that case took a different view of the statute:

"The phrase, 'shall rescind the action taken,' can be read to require merely the institution of rescission proceedings by service of a notice just as easily as it can be read to require a final decision following a formal hearing. The language of § 246(a), in short, does not preclude a tolling of the statute by the service of a notice and it is not determinative of the issue before this Court." (footnote omitted). Singh, 456 F.2d at 1095.

In Singh, the Court characterized Section 246(a) as merely a statute of limitations which could be tolled by the sending of a letter and never analyzed the peculiar language of the statute: "If, at any time within five years...it shall appear to the satisfaction of the Attorney General that the person was not in fact eligible...the Attorney General shall rescind" That Court simply ignored the marked difference between the language of Section 246(a) and statutes of limitations. Singh, supra, at 1096-1097. The only attempt to reconcile this apparent distinction is the Court's statement that "the actual language of § 246(a) affords no hint as to what Congress' intention was." Singh at 1096. Judge Wyatt did not find the Singh rationale persuasive:

"Singh v. I & S. in the Ninth Circuit, above cited, fully supports the defendants but, after careful consideration and with great deference to the able Ninth Circuit panel, I cannot accept the result. The Ninth Circuit simply found the practical consequences of the statute to be 'absurd' (456 F.2d at 1097). Such consequences, if true, do not justify rewriting the statute. As it stands, the statute has a plain bar to rescission. If this be an example of a bad policy, the solution is to ask Congress to change the statute.

The Third Circuit in Quintana v. Holland, 255 F.2d (3d Cir. 1958), reaches a conclusion contrary to that of the Ninth. The reasoning of Judge Goodrich is more persuasive to me than that of the Ninth Circuit." (A-242)

In addition to the District Court's reasoning, we urge that the short answer to the government's successful argument in Singh is that if Congress wished Section 246(a) to be a conventional statute of limitations, it could easily have said so. Indeed, Congress has had no difficulty in specifying in great detail various limitations upon governmental action. Thus, in Title 18, U.S.C. § 3282, Congress provided "no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed." ^{11/} Nor, is the particular language of Title 18 U.S.C. § 3282 of an isolated nature. The language tolling the statute of limitations by the filing of an instrument is found throughout the

^{11/} The historical and revision notes found in the United States Code Annotated indicate that this statute is based on the Act of June 25, 1948, (62 Stat. 828) and was amended by the Act of September 1, 1954, (68 Stat. 1145) and again the Act of September 26, 1961, (75 Stat. 648). Moreover, the reviser's note indicates that this section was meant to incorporate provisions in the Alien and Nationality Act Title 18 U.S.C. (1940 Edition) § 582 which provided for a three year statute with respect to felonies and fraud against the United States relating to passports or false statements to a Naturalization Examiner.

Criminal Code. ^{12/} Congress has also been specific in limiting the right of the United States to bring civil actions and to specifically provide for a toll of the statute of limitations with respect to those civil actions. Thus, in 28 U.S.C. § 2415(a) Congress has specifically provided "every action for money damages brought by the United States ... shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later" (emphasis supplied).

Congress, of course, did not make any such provisions with respect to Section 246(a). Certainly Congress could have provided a conventional statute of limitations and a tolling provision for rescission proceedings if it intended to do so. Thus, it could have drafted a provision providing that "no person shall have his adjustment of status rescinded unless such rescission proceeding is instituted within five years after his status is adjusted."

^{12/} Thus, custom's violations cannot be brought "unless the indictment is found or the information is instituted within five years next after the commission of the offense." 18 U.S.C. § 3283. (emphasis supplied). Specific provisions are made for the tolling of the statute of limitations by factors other than the filing of the indictment such as "[w]hen the United States is at war," 18 U.S.C. § 3287, or when a "person [is] fleeing from justice," 18 U.S.C. § 3290.

Nor, can we reasonably believe that the drafting of Section 246(a) of the Act was the result of a draftsman's inadvertence. Congress was acutely concerned with statutes of limitation and their elimination, when it enacted the 1952 legislation. Prior to 1952, the immigration law had contained statutes of limitation and specific provisions for the tolling of those statutes.^{13/} However, prior to 1917 these statutes did not contain provisions for their tolling and this Court held that the actual deportation must be accomplished within the period of limitation. International Mercantile Marine Co. v. United States, supra. This Court ruled in 1917, that Congress changed the law by enacting a tolling provision, Section 20 of the Act of 1917, which specifically provided: "'If deportation proceedings are instituted at any time within five years after the entry of the alien....'" (emphasis in original) United States ex rel. Patton v. Tod, 297 F. 385, 397 (2d Cir. 1924), appeal dismissed per stipulation, 267 U.S. 607 (1925).

Thus, the Immigration and Naturalization Act of 1917, 8 U.S.C. § 155 (39 Stat. 889) provided that members of a class of excludable aliens could only be deported "within five

^{13/} See provisions of the Act of February 23, 1887 and the Act of March 3, 1891, set forth in this Court's opinion in International Mercantile Marine Co. v. United States, 192 F.887 (2d Cir. 1912).

years after entry" and also contained a specific tolling provision.^{14/} As indicated, in 1952 Congress enacted the Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101 et seq. (66 Stat. 163) by which it repealed the Immigration Act of February 5, 1917, in many respects substantially changing the immigration laws of our country. One of the most striking changes was Congress' abolishment of the five year statute of limitations that had existed since the 1917 Act. Lehmann v. United States, 354 U.S. 1944 (1957). Given this Congressional awareness, which we suggest is anything but theoretical, Congress certainly would have placed into Section 246(a) a provision that provided for tolling of the time limit if it had intended to draft a conventional statute of limitations.

Perhaps this assumption is especially valid with respect to Section 246(a) of the Act. Section 246 has no analogue

^{14/} The Immigration Act of 1924, 8 U.S.C. §§ 201 et seq. (43 Stat. 153) limited the immigration of aliens into the United States but specified no limitation of time within which such deportation proceedings must be commenced. However, the 1924 Act did not repeal the five year limitation in the Act of 1917 and this latter provision remained in effect until 1952. United States ex rel. Sciria v. Lehmann, 136 F.Supp. 458, 460 (N.D. Ohio, 1955) reversed, 248 F.2d 519 (7th Cir. 1956) cert. denied 357 U.S. 927 (1958).

in the early immigration acts.^{15/} Thus, Congress was writing on a clean slate and could have treated rescission as it did the grounds for deportability, that is, without any time limits. However, they specifically chose not to do so, and inserted in Section 246 words of limitation that were markedly different from the conventional statute of limitations.

We submit that the reasons for this congressional action can be found in the underlying philosophy that prevails in the current version of the Immigration and Nationality Act. That philosophy reflects the congressional intent to permit aliens to remain in the United States after a sufficient passage of years has expired since their initial entry despite irregularities incurred in their entry or adjustment of status. Accordingly, Section 244 of the Act, 8 U.S.C. 1254 provides for the suspension of deportation for a deportable alien who has been physically present in the United States for a continuous period of not less than seven years and shows that he is a person of good moral character. Section 249 of the Act, 8 U.S.C. § 1259 permits the Attorney General to create records of admission for permanent residence for certain aliens. In practice, Section 245 of the Act, 8 U.S.C. § 1255 providing for the adjustment of status

^{15/} 82nd Cong., Second Sess., Report No. 1365 at page 197.

of aliens within the United States, allows aliens ^{16/} to remain in the United States despite the fact that they might be deportable. Discretion in these matters is often favorably exercised where aliens have been in the United States for a substantial period of time.

The Attorney General actually has come to the same conclusion with respect to the time limitations on rescission. Matter of S, 9 I & N Dec. 548 (1969). There, the Attorney General indicated that as far as he could determine, the philosophy behind Section 246(a) was to limit the government to five years to resort to the drastic penalty of rescission. The Attorney General noted that after the five years had elapsed the government could still resort to the process of deportation or exclusion to rid the country of aliens that had committed proscribed acts under the immigration law even though the Service would be required to utilize the detailed procedures set forth in the deportation section of the statute.

Finding this intent in the Act is not surprising, for we are, after all, a country of immigrants, and although the immigration laws are designed to eliminate exceptionally undesirable aliens, there is a recognition that once an alien has arrived and conducted himself properly, he should be

^{16/} Section 245 of the Act is the counterpart of the visa issuing process and is only available to aliens who are already within the United States. In the conventional immigration scheme an alien applies for a visa at a United States consul abroad, usually in his home country. See Singh, supra, 456 F.2d at 1093 n.1.

allowed to remain in his new home. Cf. Lennon v. Immigration and Naturalization Service, supra.

What Congress did not do and subsequently declined to do cannot be supplied by judicial drafting. We think this is particularly so as Congress obviously meant to prescribe a course of conduct for the government that was significantly different than that conduct prescribed by the conventional statute of limitations set out in Titles 18 and 28 of the United States Code.

POINT II

THIS COURT SHOULD NOT DEFER TO THE ADMINISTRATIVE AGENCY AS ITS DECISION WAS INCONSISTENT WITH PRIOR INTERPRETATIONS, AND INVOLVED A QUESTION OF LAW.

(a) Introduction.

The Service's principal argument appears to be that although the legislative history immediately surrounding the enactment of Section 246(a) is "unenlightening", the peculiar language used by Congress in 1952 had a long-standing history. The Service then argues that the Congressional intent in enacting Section 246(a) can be ascertained by examining the consistent and long-standing "prior interpretations of this or similar language" (Appellants' brief at 23-24). The

Service's argument concludes with the contention that the "Board's decision was reasonable, supported by legislative and administrative history and [therefore] entitled to great deference." (Appellants' brief at 29).

An examination of the record and the decisions relied upon by the government indicates that the Attorney General's delegates, the Board of Immigration Appeals and the special inquiry officer, did not consider the alleged history surrounding similar language and that if they had, they would have ascertained that the language claimed to be similar had been interpreted contrary to their construction by this and other Courts. Finally, there is no reason, in these circumstances, why this Court should defer on a question of law to an administrative agency.

(b) The Court Should Not Defer On An Issue Of Law.

The underlying premise of the Service's argument is that this Court should defer to the Board's construction of Section 246(a) of the Act. However, reviewing Courts are not obligated to stand aside and rubber stamp agency decisions that are inconsistent with Congressional intent. N.L.R.B. v. Brown, 380 U.S. 728 (1965). Regardless of agency interpretation, reviewing courts are "under a higher duty to ascertain and declare the law as Congress intended it." Federal Electrical Corp. v. Dunlop, 419 F. Supp. 221, 224 (M.D. Fla. 1976).

Moreover, this Court is asked to decide an issue of law, and in such cases "reviewing courts are not obligated to grant any deference to the agency decision." Lodges 743 and 746, International Ass'n. of Machinists v. United Aircraft Corp., 534 F.2d 422, 452 n.48 (2d Cir. 1975), cert. denied, - U.S. - , 97 S.Ct. 79 (1976). Only recently this Court refused to defer to the Board even though the Service had demonstrated that it had a consistent policy of twenty-three years of interpreting a particular section of the Act in a certain manner:

"We are fully aware of the deference that is customarily accorded the agency responsible for the administration of an Act, see Udal v. Tallman, 380 U.S. 1 (1965), but also recognize our heavy responsibility to set aside administrative decisions that are inconsistent with a statutory mandate or which frustrate congressional policy underlying legislation, see N.L.R.B. v. Brown, 380 U.S. 278, 290-92 (1965)." Tim Lok v. Immigration and Naturalization Service, - F.2d - , Docket No. 76 4202 (2d Cir. January 4, 1977) at 1238.

We see no reason why the Attorney General's delegates have any greater insight into what Congress intended than this Court. Indeed, it is their very closeness to the Act that creates a suspicion that their construction is indicative of a myopic attitude. Perhaps this myopic view is the reason that this Circuit and other federal courts have not been hesitant to strike down long-standing Service interpretations of the Act, see e.g., Tim Lok v. Immigration and Naturalization,

supra; Menon v. Esperdy, 413 F.2d 644 (2d Cir. 1969).^{17/}

- (c) Applicable Prior Judicial Decisions Demonstrate That Action Must Be Finalized Within The Statutory Period.

The Service contends that the language of the Act of October 19, 1888 is similar to the 1952 statute at bar, and that the Service's construction of the 1888 statute and in "statutes with language also emanating from the 1888 Act" has been sustained by all Courts except the Third Circuit and Judge Wyatt.^{18/} (Appellants' brief at 24-27). We submit that this argument is disingenuous.

Initially, the peculiar language of the Act of October 19, 1888 only appears in the Act of March 3, 1903, and the Act of February 20, 1907.^{19/} Thereafter, it disappears from the statute books. Of the numerous judicial decisions cited by the Appellants, only International Mercantile Marine Co., v. United States, 192 F. 887 (2d Cir. 1912) and Bun Chew v. Connell, 233 F. 220 (9th Cir. 1916) construe language

^{17/} See also, Zamara v. Immigration and Naturalization Service, 534 F.2d 1055 (2d Cir. 1976); Francis v. Immigration and Naturalization Service, 532 F.2d 268 (2d Cir. 1976); Lau v. Kiley, 410 F. Supp. 221 (S.D.N.Y. 1976).

^{18/} The Service contends that the 1888 statute cited at page 24 of its brief "served not only as a basis for subsequent deportation statutes, but, more, importantly, for Section 246(a) of the Act as well." (Appellants' brief at 24). There does not appear to be any authority for this proposition as the treatise cited does not support the Service position.

^{19/} 32 Stat. 1213; 34 Stat. 898; respectively.

similar to that set forth in the Appellants' brief at 24. The remaining cases construe Section 19(a) of the Immigration Act of February 5, 1917, 8 U.S.C. § 155(a). The language of that newer section ^{20/} bears no resemblance to the 1888 language or to the subsequent 1952 legislation. The cases cited by Appellants really stand for the proposition that under the deportation statutes existing during the period of 1917 to 1952 the Attorney General was only required to issue a warrant of arrest within the five year period.

However, these deportation statutes simply do not contain language similar to the language of Section 246(a) of the Act. Moreover, where this Court has construed language which the Service claims is similar to Section 246(a), it has consistently ruled against the Service's construction.

We suggest that the appropriate starting place is International Mercantile Marine Co. v. United States, 192 F. 887 (2d Cir. 1912). In that case, this Court was called upon to construe a deportation statute containing language

^{20/} "At any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law... shall, upon the warrant of the Attorney General, be taken into custody and deported...." Act of February 5, 1917, as amended, quoted in Miller v. United States, 181 F.2d 363 (5th Cir. 1950).

similar to Section 246(a) after the three year statute had expired.^{21/} The Court focused on Section 21 of the 1907 Act which in pertinent part provided:

"That in case the Secretary of Commerce and Labor shall be satisfied that an alien has been found in the United States in violation of this act, or that an alien is subject to deportation under the provisions of this act...he shall cause such alien within the period of three years after landing or entry therein to be taken into custody, and returned to the country whence he came, as provided by Section twenty of this act" International Mercantile Marine Co. v. United States at 888.

The Court noted that the government "insists that if the alien be taken into custody within three years, he may be deported under the statute at any reasonable time thereafter and that the statute should be construed as though it read: 'Be taken into custody at any time within three years after the date of his entry into the United States and be deported to the country whence he came at any reasonable time thereafter.'" International Mercantile Co. at 888. The Court then observed "the principal contention for the government is the argument ab inconvenienti." International Mercantile Marine Co. at 889.

^{21/} The sections in question were Sections 20 and 21 of the Act of February 20, 1907, c.1134, 34 Stat. L. 898 (U.S.Comp. St. Supp. 1909, p. 459).

Interestingly, the government in that earlier case made the exact arguments that the government makes here. However, that earlier Second Circuit Panel made the same observations as did District Judge Wyatt more than a half century later:

"Congress has said as clearly as the English language can express it, that the alien must be taken into custody and deported, that is, taken out of the country within three years. If three years be insufficient time in which to deport, the argument for additional time should be addressed to Congress and that body may enlarge the time as it has twice done already

Such a construction [i.e., the government's] of the statute would substitute our judgment for that of Congress. Judicial legislation should be avoided. It is no part of the business of the Courts to alter or amend the laws, that wherever it is attempted, increased confusion is generally the result." International Mercantile Marine Co., at 889.

This Court adhered to that interpretation in United States v. Oceanic, etc. Co., 211 F. 967 (2d Cir. 1914).^{22/}

In 1923, this Court was called upon to construe the statute of limitations of the then current Act, the Immigration Act of February 5, 1917.^{23/} United States ex rel. David v. Tod, 289 F. 60 (2d Cir. 1923). The Court was

^{22/} The Ninth Circuit in Bun Chew v. Connell, 233 F.220 (9th Cir. 1916) specifically disagreed with this Circuit's holdings in International Mercantile and in United States v. Oceanic, supra.

^{23/} 39 Stat. 874.

careful to distinguish its prior holding in Mercantile Marine Co., supra; and relied upon the new tolling provision which it deemed to modify Section 19 of the 1917 Act. The Court reasoned:

"Both these aliens belonged to classes which must under section 19 be 'taken into custody and deported' within 'five years after entry.' If this section (19) were the whole of the applicable statute, the reasoning which prevailed with us in International Mercantile Marine Co. v. United States, and United States v. Oceanic ... would require the holding that since, at the furthest, the aliens were not tendered to some vehicle of transportation for actual physical deportation within five years from their entry, the power to deport was exhausted.

But the section must be read with and in harmony with section 20, which is as much a regulation of deportation as is section 19; and the latter section declares that, "if deportation proceedings are instituted at any time within five years after the entry of the alien," the proceedings shall continue and be effectual for certain enumerated purpose.... By section 19 deportation must actually begin within five years, while by section 20 it is enough if the proceedings be instituted within five years." United States ex rel. David v. Tod at 61-62.

This Court supported its holding by reliance upon the report of the Senate Committee on the bill which became the Immigration Act of 1917:

"By using the expression 'if deportation proceedings are instituted at any time within five years after the entry of an alien,' the situation of doubt as to the meaning of section 20 of the existing law (the Act of 1907)

is cared for. Some courts have held that the limitation of the statute ceases to run with the institution by department of deportation proceedings, and others that it does not." 64th Cong., 1st Sess. Report, 352. Set forth in United States ex rel. David v. Tod at 62.

In United States ex rel. Patton v. Tod, 297 F.385 (2d Cir. 1924), appeal dismissed per stipulation, 267 U.S. 607 (1925), this Court dealt with the same statutory problem and reached the same results.^{24/} It is noted here because it is from this case that the Service's lengthy quote at pages 26 and 27 of its brief is taken. Unfortunately, for the purposes of clarity, the Service does not indicate that the Court in United States ex rel Patton v. Tod was construing Section 20 of the Act of 1917 which provided: "if deportation proceedings are instituted at any time within five years after the entry of the alien...."^{25/}

In 1927, this Court decided United States ex rel. Danikas v. Day, 20 F.2d 733 (2d Cir. 1927) and left no doubt that its decisions construing Section 19 of the Immigration

^{24/} For a contrary view see Hughes v. Tropello, 296 F. 306 (3rd Cir. 1924).

^{25/} "Sections 20 and 21 of the act of 1907 had no provision such as that in section 20 of the act of 1917, to the effect that:

'If deportation proceedings are instituted at any time within five years after the entry of the alien. * * *'" United States ex rel. Patton at 397.

Act of 1917 turned on the specific tolling provision of Section 20 of the Act.^{26/}

Thus, we see that if we are to look to the alleged similar language in the deportation sections, this Court, as well as the Third Circuit, had consistently construed that similar language as did Judge Wyatt. However, when Congress amended the immigration laws and deleted the 1888 and 1907 language, claimed to be similar to Section 246(a), it also inserted a tolling provision for the new deportation statute.

^{26/} "The proceedings were in each case taken too late.... In *United States ex rel. David v. Tod*... and *United States ex rel. Patton v. Tod*... the proceedings were under section 19 and 20 of the Immigration Act... and did not relate to seamen. In each case the arrest was within the statutory limit of five years from the date of entry. It was held that section 20, providing, as it did, 'if deportation proceedings are instituted at any time within five years after the date of entry,' was satisfied where the warrant was issued and served within the five years.

Section 34 is much plainer, for it says nothing about the institution of proceedings but provides that (any alien seaman who shall land in a port of the United States contrary to the provisions of this act,... shall be deported). This, by the plainest language, makes the taking 'into custody' within three years from landing the critical factor." (emphasis in original). *United States ex rel. Danikas* at 736.

It is at this juncture that the courts interpreted the deportation statute in the manner that the Service would have this Court interpret Section 246(a). Unfortunately for the Service the language of the deportation statute found in the 1917 Act is completely different from the language used in Section 246 and Congress did not provide for a tolling provision for Section 246(a).

(d) The Board's Decision Is Not Entitled to Deference.

Another facet of the prolix Service argument is that deference should be given to the Board because it must have discerned the Congressional intent by considering earlier judicial interpretations of prior similar language (Appellants' brief at 21-29). This contention is buttressed by assertions that the Service's approach to Section 246(a) has been consistent and has been sanctioned by judicial interpretation (ibid.). Even the merest perusal of the record and the authorities will indicate that the Board never considered similar language and that its approach to Section 246 has been anything but consistent.

In the case at bar, the special inquiry officer simply deferred to the Ninth Circuit in Singh v. Immigration and Naturalization Service, supra. In the administrative appeal, the Board also deferred to the Ninth Circuit's decision in Singh v. Immigration and Naturalization, supra.

However, the Board also relied upon its decision in Matter of Singh 13 I & N Dec. 439 (1969). Accordingly, an examination of the Board's decision in Matter of Singh will indicate the administrative rationale that supposedly deserves deference.

There, the Board has made the same mistake that the Service has made in this Court in that it relied upon the interpretation of Section 19(a) of the 1917 Act. Matter of Singh at 442, 443. Thus, the Board never considered the peculiar language found in the Act of 1888 or the Act of 1907 as the Service would have us believe on this appeal. Accordingly, the rationale set forth in the Service's brief cannot be used as a basis to support the decision as it was not utilized by the special inquiry officer or the Board of Immigration Appeals. S.E.C. v. Chenery Corp., 332 U.S. 194 (1974); N.L.R.B. v. Columbia University, 541 F.2d 922 (2d Cir. 1976). Moreover, the Board's belief that the statute "must receive a strict construction in favor of the government" taints their entire construction process.^{27/}

The Service also argues that the administrative construction of the statute has been consistent. A review of the Service's published decisions would indicate the contrary. The Service attempts to persuade this Court that the Service has had a consistent administrative practice by citing three

^{27/} Matter of Singh at 443-44. For what we believe is the correct view see authorities cited at Point I(c), supra.

obscure and hoary opinions of the Solicitor of Labor (Appellants' brief at 25). The Service does not offer any evidence of a consistent administrative practice directly relating to the 1952 legislation. A review of the published opinions indicates a marked inconsistency of approach until the Ninth Circuit sustained the Service's position as stated in Matter of Singh, supra.

Thus, in Matter of T, 8 I & N Dec. 96 (1968) it was held that under the then existing regulations, the actual order of rescission tolled the statute.^{28/} In Matter of Singh, 13 I & N Dec. 439 (1969), the Board was required to overrule the special inquiry officer who concluded that the statute was not tolled by the mailing of the letter of intent. Moreover, the Board was forced to recede from its position taken in Matter of Ettlinger, A-12548706 (1966 and 1968), wherein the Board reasoned that the entry of the rescission order tolls the statute but the alien's appeal to the Board did not vitiate that tolling. Matter of Singh at 441.

Perhaps the most important administrative insight into the five year provision is the opinion of the Attorney General in Matter of S, 9 I & N Dec. 548 (1962).^{29/} There,

^{28/} Under the administrative practice then current the District Director had the responsibility of being satisfied and issuing the order of rescission.

^{29/} The Service had requested the adverse decision of the Board be certified to the Attorney General for review pursuant to 8 C.F.R. § 3.1(h) (iii).

the Attorney General supported a decision to remand to the Board on the theory that rescission under Section 246(a) had to be accomplished within the five year period. Matter of S, 9 I & N Dec. at 555, n.8.

(e) Summary.

In Point I of this brief, we indicated that § 246(a) must be construed so that all doubts are resolved in favor of the alien. In Point II we have attempted to counter the Service's argument on deference to the administrative agency. This point demonstrates, beyond peradventure of doubt, that when Congress used the language that had any resemblance to the unique language of Section 246(a) of the Act, it was construed by this Court and others to require completion of the action contemplated within the statutory period. Finally, we believe that we have demonstrated that the Service's position is not supported by authority and deserves no deference from this Court as it involves a question of law unsupported by consistent administrative practices.

POINT III

AN ORDER OF RESCISSION ENTERED AFTER
FIVE YEARS IS TIME BARRED AND PRE-
CLUDED BY THE GOVERNMENT'S REGULATIONS.

(a) Introduction.

In Points I and II we argued that the mailing of a notice of intention to rescind is irrelevant and that the Attorney General, at the very least, must conduct some form of hearing within the five year period. Here, we argue that the Service's regulatory scheme promulgated at Part 246, Title 8, Code Federal Regulations clearly requires a special inquiry officer to be satisfied within the five year period. It is well established that a government agency must scrupulously observe its own rules and regulations which it has enacted. United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954). See also Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968).^{30/}

^{30/} As a corollary to this principle, an administrative officer cannot assume powers that are not specifically provided for in statutes or regulations. In the words of Judge Frank: "In fairness to the regulated, the provisions of the regulations should not be deemed to include what the administrator, exercising his delegated power, might have covered but did not cover." Tobin v. Edward S. Wagner Co., 187 F.2d 977, 979 (2d Cir. 1951).

(b) The Regulations Demonstrate That The Attorney General Must Rescind Within The Five Year Period.

An examination of the regulatory scheme clearly shows that the Attorney General has delegated his obligation to be satisfied that the alien was not entitled to an adjustment of status within five years to special inquiry officers that might hear the case.^{31/} District directors have not been delegated such authority, and as we noted cannot assume such authority.

Part 246 of Title 8 C.F.R.^{32/} specifically deals with rescission of adjustment of status. An initial provision of that section is: "[i]f it appears to a district director that a person residing in his district was not in fact eligible

^{31/} 8 C.F.R. § 246.7 provides for an appeal of the decision of the special inquiry officer to the Board of Immigration Appeals. The complaint contains a claim for relief alleging that the appeal process must be exhausted within the five year period. However, this Court need not reach that argument because a decision that the district director's mailing of a notice of intent does not act as a tolling of the statute, and that the special inquiry officer must make a decision within the five year period would render this point academic. Out of an abundance of caution, the Appellee states that he does not waive his position with respect to the claim for relief based on an appeal to the Board of Immigration Appeals within the five year period.

^{32/} The starting place to track the regulatory scheme is the delegation of the Attorney General's duties under the immigration and ~~naturalization~~ laws to the Commissioner of Immigration and Naturalization, 8 C.F.R. §§ 2.1, 100.2. The Commissioner, in turn, has delegated certain of his authority to, among others, district directors and special inquiry officers. See 8 C.F.R. §§ 100.2, 102.1(n), 103.1(n) and 103.1(p). Special inquiry officers who have certain statutory powers with respect to deportation hearings, have been empowered by the regulations to conduct "proceedings for rescission of adjustment of status." 8 C.F.R. § 102.2(p).

for adjustment of status made in his case, a proceeding shall be commenced by the personal service upon of a notice of intention to rescind" 8 C.F.R. § 246.1. If the notice to rescind is resisted by the alien, who is designated the "respondent", then "a hearing ... shall be conducted by a special inquiry officer" 8 C.F.R. § 246.3.

The District Director, represented by a Service trial attorney, prosecutes the Service's case before the special inquiry officer. The Attorney General has delegated to the special inquiry officer the responsibility "to determine whether adjustment of status shall be rescinded, to make decisions thereon, including an appropriate order, and to take any other action consistent with applicable provisions of law and regulations as may be appropriate to the disposition of the case." 8 C.F.R. § 246.4. The decision of the special inquiry officer "shall include a discussion of the evidence and finding as to the rescission." 8 C.F.R. § 246.6. Thus, whatever power the Attorney General has with respect to the actual rescission of adjustment of status it now rests firmly in the hands of special inquiry officers.

Not only has the delegation of the Attorney General's power to special inquiry officers been extensive, but most importantly, it has been exclusive. No other administrative officer has been delegated the initial responsibility to be

satisfied that the alien was not, in fact, eligible for adjustment of status. Therefore, at the very least, the special inquiry officer must be satisfied within the five year period. Of course, satisfaction under the regulations means that the special inquiry officer must take evidence under and pursuant to the regulatory scheme and satisfaction is tantamount to a decision on his part that the alien was not, in fact, eligible. Quintanna v. Holland, supra. This was the District Court's rationale. Thus, Judge Wyatt held:

"Under date of May 20, 1970, the District Director of the Service served Zaoutis with a 'notice of intention to rescind' his adjustment of status. The procedure was as provided in Regulations, specifically 8 CFR 246.1. In this notice there is no statement that it had appeared 'to the satisfaction of the Attorney General' [or a designated representative, such as the District Director] that Zaoutis 'was not in fact eligible for... adjustment of status'. On the contrary, the notice states that it is 'alleged' and that it is 'charged' that Zaoutis was not in fact eligible for adjustment of status....

It seems clear, however, that the determination and notice by the district director which commences the proceeding is not a delegated determination under the statute which requires rescission of the adjustment of status. The object of the proceeding under the Regulations is to determine whether the alien 'was not in fact eligible for such adjustment of status' (8 U.S.C. § 1256(a)), a determination made for the Attorney General by the Board of Immigration Appeals after an initial decision of a special inquiry officer. 8 CFR 3.1, 246.6, 246.7" (A-239, 240).

In the case at bar, the special inquiry officer was not in a position to be satisfied that the alien was, in fact, not eligible until the statute had run by several years. Accordingly, rescission is barred under the terms of Section 246(a).

POINT IV.

ZAOUTIS IS NOT PRECLUDED FROM
ASSERTING SECTION 246(a) OF THE
ACT BECAUSE THE SERVICE DELAYED
THE PRESENTATION OF EVIDENCE OR
FOR REASONS OF PUBLIC POLICY.

The Service argues that "it would be manifestly inequitable for [the Court] to allow Zaoutis to assert the statute of limitations in this action." (Appellants' brief at 35). This is simply an incredible argument in light of the Service's continued procrastination which the record adequately demonstrates.

Thus, according to the Service, it had more than adequate knowledge to commence proceedings in February of 1970. (Appellants' brief at 7). However, it waited until May 20, 1970, to mail its letter to Zaoutis. Zaoutis responded within twenty days and indicated that he was available for an immediate hearing. The Service did nothing for over a year. The reason for this procrastination was because the Service deliberately delayed the proceedings to

accommodate the interests of the Disciplinary Committee of the Association of the Bar, whose representative had requested "to hold in abeyance the pending rescission proceedings against [Zaoutis] until the completion of the TIMON matter before its body." (A-169). Zaoutis did cooperate with the Disciplinary Committee, but there is absolutely no evidence to indicate that he delayed the immigration proceedings in any manner. The Appellants imply that Zaoutis requested this delay. (Appellants' brief at 35). The record clearly indicates that the reason for delay emanated from the Service's desires and not Zaoutis' (A-38, 144, 169).

The Service finally got around to convening its initial hearing on June 2, 1971. Zaoutis' counsel promptly moved to terminate the proceedings and when the special inquiry officer requested briefs, Zaoutis' counsel agreed to submit his brief within ten days.

Despite the prompt submission of that brief, the special inquiry officer and the Service did not convene the hearing for almost another year (A-44). Zaoutis had not requested any delays until this time. At the hearing on June 2, 1971, the government's trial attorney asked for a twenty day adjournment on the ground that he had a "witness coming in from quite a good distance away." (A-62). At this point Zaoutis apparently left the United States to attend his

wife who was giving birth to their third child. On June 9th, his lawyer asked for an adjournment "until sometime in September 1972." Zaoutis' attorney explained that the reason for this request was that Zaoutis wished to stay with his wife "since she is very sick due, to childbirth. She has asked that he not leave her at this particular time" (A-171). This, of course, is the only delay that the government can point to, and by the time it was submitted the proceedings were already barred.

The Service did not reconvene the hearing until October 2, 1972, at which time it put in the bulk of its case. However, the Service, for some unexplained reason, then scheduled the next hearing for February 7, 1973. The special inquiry officer did not render his decision at that time, but procrastinated for another eight months to render his almost pro forma opinion (A-79, et seq.).

Accordingly, we see that Zaoutis, who was prepared to have his hearing in June of 1970 prior to the expiration of the five-year statute, did not obtain that hearing because of the Service's actions. Thus, the record in the instant case, rather than demonstrating the difficulties inherent in applying the District Court's interpretation of Section 246(a), illustrates the abuses flowing from the Service's interpretation.

The Service argues that it would be against public policy to require rescission procedures to be completed within five years after the date of adjustment, as such an interpretation would put a premium on hasty adjudications and dilatory action on the part of the respondent alien. Initially, we would observe that the Service's interpretation allows the government to string out, almost indefinitely, the period when the alien's status is in question. Certainly, that is what happened to Zaoutis. Moreover, the Service's interpretation is not consistent with the Congressional intent to allow an alien to remain in the United States after he has spent five years as a resident but reserves to the government the right to utilize deportation procedures to remove aliens who have committed proscribed acts subsequent to their adjustment of status.

CONCLUSION

The decision of the District Court should be affirmed.

Dated: New York, New York
March 3, 1977

Respectfully submitted,

Winer, Neuburger & Sive
Attorneys for Plaintiff-
Appellee, Stefanos Zaoutis

Daniel Riesel

Of Counsel

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Attorney for

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COPY RECEIVED
Robert B. Fiske, Jr.
UNITED STATES ATTORNEY
3/3/77
Marion L. Bryant